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In the Supreme Court of the United States

OCTOBER TERM, 1978

RAYMOND WESLEY FICKLIN, JR., AND RICHARD PAUL SEEFELDT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals was entered on February 10, 1978 (Pet. App. A; 569 F. 2d 352 (table)). A petition for rehearing was denied on March 28, 1978 (Pet. App. B).

JURISDICTION

Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including May 18, 1978, and the petition was filed on May 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether law enforcement officers may conduct a brief, investigatory stop of a motorist based on a founded suspicion of criminal activity.

2. Whether the initial stop of petitioners became unlawful because they were detained so that a radio check could be conducted.

3. Whether the warrantless search of a plastic-wrapped bundle in the bed of petitioner Ficklin's pickup truck violated the Fourth Amendment.

4. Whether petitioners were deprived of due process of law when the court of appeals affirmed their conviction without oral argument.

STATEMENT

After a jury trial in the United States District Court for the District of Nevada, petitioners were convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner Ficklin was sentenced to three years' imprisonment and two years' special parole and was fined $10,000. Petitioner Seefeldt was fined $6,000. The court of appeals affirmed (Pet. App. A).

The facts adduced at the suppression hearing showed that at approximately 6:30 a.m. on April 12, 1977, Deputy Sheriff John Bentley was dispatched to the scene of a highway traffic accident in Lyon County, Nevada. When he arrived at the scene of the reported accident, he observed skid marks, debris, and a damaged camper shell, but no vehicles (Tr. 3-4, 13). Bentley radioed Officer Larry Brown for assistance in investigating the possibility of a hit-and-run accident. He advised Brown to be on the lookout for damaged vehicles and informed him that (because of the damaged camper shell) one of the vehicles might be a pickup truck (Tr. 4, 13, 36-37).

Bentley then began a search of the area for the automobiles involved. He noticed dust hanging in the air over a nearby dirt road, indicating to him that a vehicle must

recently have traveled the road. Bentley turned off the highway onto the road and saw two pickup trucks several hundred yards away. One of the trucks approached Bentley's car, while the other truck, which appeared to be damaged, remained stationary (Tr. 5-6, 16). Bentley stopped the truck when it reached his position. Petitioner Seefeldt got out of the vehicle, identified himself at Bentley's request, and told Bentley that "they were just up there riding motorcycles" (Tr. 7). When Bentley mentioned the accident, however, Seefeldt stated that he had helped the driver of the damaged truck "leave the scene of the accident so he wouldn't get in trouble" (*ibid.*). Seefeldt also stated that he did not know the other driver (*ibid.*).

Petitioner Ficklin then left the other truck, walked up the road and asked Seefeldt, "What's the matter, Moe?" (Tr. 8).[1] Seefeldt then acknowledged to the officer that he knew Ficklin after all (Tr. 8, 17-18). Shortly thereafter, Officer Brown arrived. Bentley instructed him to go down the road to the damaged truck and determine whether there was anything unusual about it. Bentley then conducted a radio check with police headquarters to determine whether there were outstanding warrants against petitioners or whether their vehicles were stolen (Tr. 8-9, 18-19, 40, 49).

As Officer Brown approached the damaged truck, he observed approximately 25 to 30 large, plastic-wrapped bundles in plain view in the open bed of the truck, and another bundle on the ground next to the truck. He knew from police instructional demonstrations that marijuana was packaged in that manner and also knew that local

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[1]Seefeldt wore a hat bearing the name "Moe" (Tr. 8).

agricultural products were not (Tr. 41-42). Brown therefore cut a two-inch slit in one of the bundles in the truck and observed marijuana inside (Tr. 43).

ARGUMENT

1. Petitioners contend (Pet. 7-10) that although *Terry* v. *Ohio*, 392 U.S. 1, and *Adams* v. *Williams*, 407 U.S. 143, permit a brief, investigatory stop of an individual based upon a founded suspicion of criminal activity, those cases are inapplicable to investigative detentions of motorists in vehicles. In essence, petitioners argue that the driver of an automobile may not be stopped unless there is probable cause to arrest him or to search the vehicle.

We note at the outset that petitioners did not raise this claim in the courts below.[2] Absent exceptional circumstances not present in this case, this Court has stated that it will decline to review an argument not that has not been raised in the courts below. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 7; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16.

In any event, petitioners' claim lacks merit. In *Terry* v. *Ohio*, *supra*, 392 U.S. at 22, the Court stated that the governmental interest "of effective crime prevention and

[2]In the district court and the court of appeals, petitioners argued only that the investigating officer lacked a founded suspicion to detain them (a claim they have apparently abandoned). See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-882. As the district court correctly held (Pet. App. A-2), "[t]he circumstances of the accident coupled with [petitioners'] suspicious behavior (hurriedly leaving the scene of the accident, abandoning a camper shell and meeting the officer away from the damaged truck), gave the officer a reasonably founded suspicion of criminal activity which led him to investigate." Cf. *United States* v. *Pearson*, 448 F. 2d 1207, 1212 (C.A. 5).

detection * * * underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." Following *Terry*, the Court has emphasized that "it may be the essence of good police work to adopt an intermediate response." *Adams* v. *Williams*, *supra*, 407 U.S. at 145. The governmental interests sought to be protected by such investigatory measures are no less compelling when a suspicious individual is a motorist, rather than a pedestrian.[3] Nor is the intrusion of a brief, investigatory stop any greater merely because a vehicle is also involved. The principles articulated by the Court in *Terry* are thus equally applicable to investigative stops of vehicles. Indeed, to hold otherwise would mean that a criminal could escape detection simply because he was driving a vehicle at the time the officer's suspicions became aroused.

In *United States* v. *Brignoni-Ponce*, 422 U.S. 873, the Court held that investigative stops of vehicles based on a reasonable suspicion of criminal conduct are permissible in border areas (*id.* at 881-882, 884). Petitioners claim (Pet. 7) that, apart from this border search context, this Court has never upheld the legality of investigative stops of vehicles. In its decision in *Brignoni-Ponce*, however, the Court emphasized that it relied on the holding in *Terry* that limited investigative stops are "a valid method of protecting the public and preventing crime" (*id.* at 881). This general affirmation of the principles of *Terry* in the

[3]The need to utilize a brief stop in investigating suspected criminal activity would seem even more pronounced when the suspect is moving in a motor vehicle. See *Chambers* v. *Maroney*, 399 U.S. 42, 51.

context of investigative stops of vehicles does not suggest an intent to narrow the categories of criminal conduct that will justify investigative measures or to confine such measures to particular geographic areas. The courts of appeals have thus uniformly held that investigative stops of vehicles may be justified by reasonable suspicion of criminal conduct such as robbery (*United States* v. *Wright*, 565 F. 2d 486, 488-489 (C.A. 8), certiorari denied, No. 77-1130, April 17, 1978), bank robbery (*United States* v. *Gaines*, 563 F. 2d 1352, 1357 (C.A. 9); *United States* v. *Hall*, 557 F. 2d 1114, 1116-1117 (C.A. 5), certiorari denied, No. 77-5402, October 17, 1977), auto theft (*United States* v. *Solomon*, 528 F. 2d 88, 90-91 (C.A. 9)), and naroctics suggling (*United States* v. *Hickman*, 523 F. 2d 323, 327-328 (C.A. 9), certiorari denied, 423 U.S. 1050). Since there is no conflict among the circuits on this issue, there is no need for further review in this Court.[4]

2. Petitioners claim (Pet. 8-10) that even if the decision to initiate the investigation was justified, it was improper for the officer to detain petitioners pending a radio check to determine whether there were outstanding warrants against petitioners or whether their vehicles were stolen.[5]

As in *Terry* v. *Ohio*, *supra*, 392 U.S. at 29, however, the officer's investigative stop and inquiry was "reasonably related in scope to the justification for [its] initiation." There had been an accident, and the officer had reason to

[4]Finally, this argument seems inappropriate under the facts of this case since the truck containing the marijuana was at all times parked on the dirt road and was never stopped by the officers. While petitioner Seefeldt's truck was stopped, that stop was only indirectly related to the discovery of the marijuana.

[5]It was during this brief detention that Officer Brown discovered the marijuana.

believe one or both of the trucks may have been involved. This alone justified investigation. Petitioners' conduct when investigation was initiated served to reinforce suspicion that they were implicated in misconduct. Although petitioners identified themselves at Deputy Bentley's request, Seefeldt's responses to the officer's questions were awkward and contradictory. Seefeldt initially stated that he and Ficklin had been riding motorcycles. Subsequently, he stated that, although he did not know Ficklin, he had assisted him in leaving the scene of the accident "so he wouldn't get in trouble" (Tr. 7). Bentley's suspicions justifiably increased when Ficklin approached from the damaged vehicle and Seefeldt and Ficklin acknowledged that they knew each other. In these circumstances, it was reasonable for Bentley to investigate further the possibility that a hit-and-run incident had occurred and to determine the reason why Seefeldt and Ficklin had left the accident site. In light of petitioners' conduct, it was reasonable for the officer to suspect that the damaged vehicle may have been stolen (Tr. 57), and it was thus reasonable for the officer to conduct a radio check to verify or negate this possibility. See *United States* v. *Wylie*, 569 F. 2d 62, 68-71 (C.A. D.C.), certiorari denied, No. 77-6037, March 27, 1978; *United States* v. *O'Looney*, 544 F. 2d 385, 389 (C.A. 9), certiorari denied, 429 U.S. 1023.

3. Petitioners contend that the warrantless search of the plastic-wrapped bundle in the open bed of the damaged pickup truck violated the Fourth Amendment.

a. Petitioners first claim (Pet. 11-16) that Officer Brown lacked probable cause to make the two-inch slit in the covering of the bundle in order to search for marijuana. After a thorough review of the record, the district court concluded that there was probable cause to search (Tr. 57), and the court of appeals affirmed (Pet. App. A-3).

Officer Brown knew that there had been an early morning highway traffic accident and that the vehicle or vehicles involved had left the scene, abandoning a camper shell. He also knew that Deputy Bentley had located two pickup trucks on a nearby dirt road at a spot not visible from the highway and that Bentley was then engaged in questioning petitioners. Brown noticed that one of the trucks appeared to be damaged and therefore may have been involved in the reported accident. Approaching the truck to investigate further, Brown observed 25 to 30 large, plastic-wrapped bundles in the open bed of the truck and a similar bundle on the ground next to it. From training he had received in police instruction activities, Brown knew that marijuana was packaged in such a manner (Tr. 7-8). Brown therefore opened one of the packages and discovered that marijuana was indeed inside.

As the district court concluded (Tr. 57), the facts observed by Brown would indicate "[t]o anyone either trained or experienced in marijuana smuggling cases" that there was probable cause to believe that the packages contained marijuana. The facts that the vehicle was "overloaded with, some say thirty [bundles]," that the "camper shell had been knocked off the vehicle somehow" and that petitioners had then attempted to "secret[e] the two vehicles from view," all led the court to conclude that the officer possessed probable cause to conduct the search (*ibid.*). Here, as in *United States* v. *Patterson*, 492 F. 2d 995, 997 (C.A. 9), certiorari denied, 419 U.S. 846, the "totality of the evidence, to an experienced [officer] familiar with the methods employed" in transporting marijuana, established the requisite justification for the search. There is no reason for this Court to review the essentially factual determination of the courts below.

b. Petitioners further contend (Pet. 13-16) that, even if the search was based upon probable cause, the warrantless search of the bundle was invalid under this Court's decision in *United States* v. *Chadwick*, 433 U.S. 1. In *Chadwick*, a locked trunk had been removed to a federal building and inspected at a time when "there was no risk that whatever was contained in the footlocker trunk would be removed by the defendants or their associates" (*id.* at 4). In that context, the Court held that the warrantless inspection of the footlocker violated the Fourth Amendment (*id.* at 11): "There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides" (*ibid.*).

Unlike the instant case, *Chadwick* did not involve the exigent circumstance presented when a motor vehicle is searched on the public highway on the basis of probable cause to believe that it contains evidence of a crime. See *Chambers* v. *Maroney*, 399 U.S. 42, 48-52.[6] *Chadwick* reaffirmed, however, that this Court has long "recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." 433 U.S. at 12. The Court stated that this distinction is "based in part on [an automobile's] inherent mobility, which often makes obtaining a judicial warrant impracticable," and in part on "the diminished expectation of privacy which surrounds the automobile" (*ibid.*).

The court of appeals properly concluded that the exigency that justifies a warrantless search of a car and its contents "still existed at the time of the search" in this

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[6]As the Court noted in *Chadwick*, *supra*, 433 U.S. at 11, the government did not contend that "the footlocker's brief contact with Chadwick's car makes this an automobile search * * *."

case (Pet. App. A-4). As this Court has held, the opportunity to search a car that "is readily movable" is "fleeting," and once the "occupants are alerted [to the officer's suspicions] * * * the car's contents may never be found again if a warrant must be obtained." *Chambers* v. *Maroney, supra,* 399 U.S. at 51. If the officer in this case had neither conducted the search of the contents of the truck nor seized the vehicle, it is apparent that the "fleeting" opportunity to investigate the suspected crime would have been lost. The search in this case thus fits comfortably within the confines of the traditional automobile search exception to the warrant requirement, which exception was not cut back by *Chadwick*.

Furthermore, as the court of appeals noted (Pet. App. A-4), petitioner's expectation of privacy for the plastic and burlap bags piled several feet high in the open back end of the pickup truck located on a public highway was not substantial, and was far less significant than that in *Chadwick*, where law-enforcement agents had opened a footlocker that had been secured by two locks. See 433 U.S. at 13. This reduced basis for a legitimate claim of privacy, coupled with the exigencies imposed by the circumstances, indicate that the officer's search was valid.

4. Pursuant to Rule 3(a) of the Rules of the United States Court of Appeals for the Ninth Circuit,[7] petitioners received written notice that their appeal would be decided

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[7]Rule 3(a) provides in pertinent part:

> Pursuant to Rule 34(b) of the Federal Rules of Appellate Procedure, there is hereby established a class of cases to be submitted without oral argument. There may be placed in this class any appeal, * * * in which * * * (b) the questions raised on appeal are, in the unanimous opinion of a panel of the court, of such a nature that oral argument would not be of assistance to the court.
>
> When a case has been classified for submission without oral argument, the clerk shall give the parties notice in writing of such action.

without oral argument and were invited to submit additional authorities in writing within ten days. They did so. Thereafter, the court of appeals affirmed petitioners' conviction by written opinion without oral argument. Petitioners contend (Pet. 16-18) that the court's disposition of their appeal without oral argument denied them due process of law and that the court failed to follow the procedures outlined in its own rule. Both contentions are without merit.

a. Oral argument is not a due process right guaranteed by the Fifth Amendment. As was held in *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 276, "[c]ertainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised."[8] Following this decision, the courts of appeals uniformly have held that oral argument may be dispensed with where the court determines that it will not be of significant assistance to the resolution of the appellate controversy. *E.g., National Labor Relations Board* v. *Local* 42, *International Association of Heat and Frost Insulators and Asbestos Workers*, 476 F. 2d 275, 276 (C.A. 3) (*en banc*); *Huth* v. *Southern Pacific Co.*, 417 F. 2d 526, 529-530 (C.A. 5).[9]

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[8]Although the decision in the *WJR* case was made in the context of an administrative appeal, the Court indicated that its conclusion that the due process clause does not require oral argument applies also to "judicial tribunals of the federal system and the equally numerous and diversified interests affected by their functioning * * *" (*id.* at 275).

[9]Petitioners claim (Pet. 17) that *Morgan* v. *United States*, 298 U.S. 468, establishes that oral argument is a due process requirement. In fact, the Court held in *Morgan* that argument submitted in writing is sufficient (*id.* at 281). See *Federal Communications Commission* v. *WJR, The Goodwill Station Inc., supra,* 337 U.S. at 276.

b. Petitioners' second claim is based on the fact that the opinion below was rendered at the expiration of the ten day period within which additional authorities could be submitted. According to petitioners, that action "clearly establish[ed] that the decision had been made earlier and that no consideration could have been given to the later material filed" by petitioners (Pet. 16-17). In the first place, the rule itself makes no express provision for submission of additional authorities. See note 6, *supra*. Furthermore, petitioners' unsupported assertion that the court failed to consider the supplemental citations neglects to take into account that the opinion may have been prepared and held pending petitioners' submission. Indeed, petitioner have failed to suggest any supplemental authority that the court of appeals did not thoroughly consider or properly reject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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